NO. 20725

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCES HAYNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES
Assistant U. S. Attorney

600 U. S. Court House
312 North Spring Street
Los Angeles, Calif. 90012

Attorneys for Appellee
United States of America

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Attorneys for Appellee
United States of America

TOPICAL INDEX

		Page
I	JURISDICTIONAL STATEMENT	1
II	PERTINENT STATUTE	3
III	STATEMENT OF FACTS	4
IV	ARGUMENT	7
	A. APPELLANT HAD CONSTRUCTIVE POSSESSION OF THE HEROIN AS CHARGED IN COUNTS FIVE AND SIX	7
	B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A FINDING OF GUILTY AS TO COUNT VII	10
V	CONCLUSION	12
CERTIFICATE		13

TABLE OF AUTHORITIES CITED

Cases

	Page
Anthony v. United States 331 F. 2d 687 (9th Cir. 1964)	12
Bruno v. United States 259 F. 2d 8 (9th Cir. 1958) cert. denied 333 U. S. 832	11
Hernandez v. United States 300 F. 2d 114 (9th Cir. 1962)	8
McClure v. United States 332 F. 2d 19 (9th Cir. 1964)	8, 10
Pon Wing Quong v. United States 111 F. 2d 751 (9th Cir. 1940)	11
Rodella v. United States 286 F. 2d 306 (9th Cir. 1960)	8
Williams v. United States 290 F. 2d 451 (9th Cir. 1961)	12

Codes

Title 21, United States Code §174	1, 3, 10
Title 28, United States Code §1291	2
Title 28, United States Code §1294	2

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I

JURISDICTIONAL STATEMENT

Appellant, Frances Haynes, and James Walter Nelson were indicted by the Federal Grand Jury for the Northern Division of the Southern District of California, on June 10, 1964, under No. 4101-ND [C. T. 2].[1/] The indictment was in seven counts. Counts One, Two, Three and Four were charged against co-defendant Nelson alone. Counts Five, Six and Seven were charged against both appellant and her co-defendant. Count Five of the indictment charged violations of Title 21, United States Code,

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1/ C. T. refers to the Clerk's Transcript of Record on Appeal.

Section 174, knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of heroin, a narcotic drug, on or about May 3, 1964. Count Six charged the unlawful and knowing selling and facilitation of sale on the same occasion. Count Seven charged a violation of Title 21, U. S. C. §174, unlawful receiving, concealing and facilitating the concealment and transportation of heroin, on or about May 20, 1964.

On July 13, 1964, appellant was arraigned and entered a plea of not guilty. Appellant was represented at trial by court appointed counsel [C. T. 9].

On April 7, 1965, the appellant was convicted on all three counts after a court trial before the Honorable Myron D. Crocker, United States District Judge [C. T. 11]. On June 7, 1965, the appellant was committed to the custody of the Attorney General for a period of six years on Count Five; six years on Count Six, and six years on Count Seven. The sentences on Counts Six and Seven were to run concurrently with sentence on Count Five. The appellant was permitted to remain on bond pending the filing of an appeal [C. T. 13].

On June 10, 1965, a timely appeal was filed by appellant in this court under the provisions of Title 28, United States Code, Sections 1291 and 1294 [C. T. 14].

II

PERTINENT STATUTE

Title 21, United States Code, Section 174, provides as ollows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize

conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

On April 29, 1964, two sales of heroin took place in Fresno, California. The buyer in both instances was John Lee, who was working as an undercover United States Treasury Agent assigned to the Bureau of Narcotics [R. T. 55]. 2/ The location for both sales was the same, Room 4, City Motel, Fresno [R. T. 57, 63].

The first sale occurred shortly after John Lee arrived at the room. He was admitted by Frank Barnes, and when inside, he was introduced to three persons including James Nelson and the appellant, Frances Haynes [R. T. 57]. The transfer took place in the bathroom with Nelson handing Lee three "spoons" of heroin and receiving the sum of $350.00 in return [R. T. 58-59]. At the time of this transfer of heroin, the appellant remained in the living room [R. T. 58].

John Lee then left the motel and returned later in the evening when the second sale of heroin took place. The transfer again occurred in the bathroom between Nelson and Lee. On this occasion, Nelson gave Lee two "spoons" of heroin and received the sum of $200 [R. T. 63]. As before, the appellant stayed in the

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2/ R. T. refers to Reporter's Transcript.

iving room during the transaction [R. T. 63].

A day later, on April 30, 1964, appellant personally made rrangements for an additional sale of heroin to John Lee. The mount was to be a "piece" (an ounce of heroin), the price, $600, nd it was to be good quality heroin [R. T. 68]. The transaction ould take place the following weekend in Fresno [R. T. 67-68]. ppellant further indicated that she would be able to take care of ny further purchases of heroin that John Lee might want to make R. T. 68].

Pursuant to the agreement for the sale, John Lee went at :00 A. M., on May 3, 1964, to Room 4, City Motel, Fresno. At his time, the terms of the previous arrangement were carried ut. Lee met with Nelson in the bathroom of the motel room, Nelson handed Lee one ounce of heroin and received in return the greed upon sum of $600 [R. T. 70-71].

Afterwards on May 13, 1964, John Lee spoke with the ppellant and complained about the quantity of the heroin he had eceived in the sale on May 3rd [R. T. 75]. He told appellant hat it was less than the ounce they had agreed upon. She replied hat she could not understand how that could be since the particular eroin sold to him had been measured with a spoon [R. T. 75].

During this same conversation, appellant made arrange- nents for another sale of heroin to John Lee. Appellant agreed to ell a larger amount in the next transaction, namely twelve ounces f heroin for the sum of $6,000. [R. T. 75]. The exact date for the ale would be determined within a few days [R. T. 76].

On May 18, 1964, Lee received a telephone call from Nelson who stated that they did not have 12 ounces to sell just at that time, but that they did have 2-1/2 ounces [R. T. 78]. Nelson further informed Lee that, after considering the matter, he should phone the appellant and let her know if he wanted to buy the smaller amount [R. T. 78].

Later that date, Lee contacted appellant at a location in Los Angeles [R. T. 79]. At this time she agreed to sell Lee 2-1/2 ounces of heroin for the sum of $1200. [R. T. 79]. The transaction was planned to take place at a motel in Fresno where Lee would obtain a room, and at a time after 7:00 P. M., on May 19, 1964 [R. T. 80].

Because of John Lee's subsequent illness, he was unable to be present at the planned culmination of this transaction. Another U. S. Treasury Agent, Steven S. Chesley, substituted for him, and checked in to Room 118, Carousel Motel, Fresno, on the evening of May 19th [R. T. 84-85].

At 5:45 A. M., May 20, 1964, Chesley received a telephone call from Nelson regarding the sale previously agreed upon [R. T. 85-86]. Chesley, imitating Lee's voice, gave Nelson the directions to the motel [R. T. 86].

At 6:00 A. M., Nelson and the appellant arrived at the motel in a taxi [R. T. 87, 96]. While appellant remained in the car with the heroin, Nelson went to Room 118 and was placed under arrest as he entered. As a narcotic officer then approached the taxi that was parked outside the motel, the appellant attempted

o conceal a cigarette package containing the heroin [R. T. 97-98]. At this time, the appellant was placed under arrest [R. T. 97].

IV

ARGUMENT

A. APPELLANT HAD CONSTRUCTIVE POSSESSION OF THE HEROIN AS CHARGED IN COUNTS FIVE AND SIX.

Appellant maintains that the sole evidence relating to Counts Five and Six consists of Agent Lee's testimony concerning two sales of heroin that took place in a motel room in Fresno, allegedly on May 3, 1964 [Appellant's Brief, p. 3]. Appellant argues that these transactions occurred between John Lee and James L. Nelson, and that at no time did she actively participate in the sale [Appellant's Brief, pp. 3-4]. Lee's testimony, according to appellant, "... was essentially the evidence used by the court in finding the appellant guilty of Counts Five and Six of the indictment." [Appellant's Brief, p. 4].

An examination, however, of the record of trial will reflect the inaccuracy of this contention. The two sales of heroin referred to took place, not on May 3rd, but on April 29, 1964 [R. T. pp. 56-64]. The appellant is not charged with any offense taking place on April 29, 1964 [C. T. 2-8].

A single sale of heroin did, nevertheless, take place on May 3, 1964 for which the appellant was charged [R. T. 70-71].

That transaction forms the basis of Counts Five and Six of the Indictment [C. T. 6-7].

The prime issue is the existence of sufficient evidence of possession of heroin on the part of the appellant. Although she did not physically engage in the actual transfer on May 3rd, the record is clear that she exercised dominion and control of the heroin involved. The evidence is uncontroverted of appellant's deep and direct involvement and participation in the actual sale.

The courts have consistently held that evidence of dominion and control of a narcotic is sufficient to warrant a finding of constructive possession.

As the Court has held in Hernandez v. United States, 300 F. 2d 114, 117 (9th Cir. 1962):

> "So long as the evidence establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of the third persons -- 'possession' as used in this statute included both actual and constructive possession. The power to control an object may be shared with others, and hence, 'possession' . . . need not be exclusive, but may be joint."

See also Rodella v. United States, 286 F. 2d 306 (9th Cir. 1960), and McClure v. United States, 332 F. 2d 19 (9th Cir. 1964).

In the instant case, the sale of heroin on May 3rd can be traced directly to the events of April 29th. Agent Lee had gone to the City Motel in Fresno to make a narcotic purchase. Two sales took place in the bathroom of the motel unit between the agent and James Nelson. It was at this time, just prior to the first actual sale, that Agent Lee was introduced to the appellant.

It was only one day later, on April 30th, that appellant personally set up a specific sale of heroin to Lee that took place on May 3rd [R. T. 67-68]. It was the appellant who set up all the details: She established the price of $600.00 for the ounce, she guaranteed it would be good quality heroin, and set the location of the sale as the following weekend in Fresno [R. T. 68].

Pursuant to this agreement, Lee in fact made the purchase. It took place in Room 4, City Motel, Fresno, this being the exact location of the two sales on April 29th. The mode of transfer was precisely the same, with the exchange taking place in the bathroom between Lee and James Nelson.

It is revealing to examine the statements of appellant after the transaction of May 3rd. It was on May 13th, that Agent Lee spoke with appellant and complained he had not received the full ounce of heroin they had agreed upon. Appellant at this time indicated she could not understand how that could have happened, since the heroin had been measured with a spoon [R. T. 79].

In light of these uncontradicted facts, the relevant statute is controlling to the extent that "... possession shall be deemed sufficient evidence to authorize conviction unless the defendant

explains the possession to the satisfaction of the jury." Title 21, United States Code, Section 174.

In 1964 this Court ruled that:

> "Possession sufficient to raise the presumption can be either actual or 'constructive'. Actual physical contact with the drugs is not required; rather, possession consists of 'having [the drugs] in one's control or under one's dominion.' (Citation omitted) The power to control can be shared by others, and it can be shown by direct or circumstantial evidence."
>
> McClure v. United States, 332 F. 2d 19, 23 (9th Cir. 1964).

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A FINDING OF GUILTY AS TO COUNT VII.

Appellant argues that "... Count 7 of the Indictment ... refers to a sale allegedly made by appellant which occurred on May 20, 1964." [Appellant's Brief, p. 5]. It is then suggested that the evidence was insufficient since in fact no sale ever occurred. [Appellant's Brief, p. 5].

Count Seven of the Indictment, however, refers not to a sale of heroin, but rather to a knowing receiving, concealment and facilitating the concealment of heroin, in violation of Title 21, United States Code, Section 174 [C. T. 8].

This Court in Pon Wing Quong v. United States, 111 F. 2d 751, 756 (9th Cir. 1940), has discussed the meaning of the word "facilitate" as used in the above statute:

> " . . . the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

See also Bruno v. United States, 259 F. 2d 8 (9th Cir. 1958), cert. denied 333 U. S. 832.

The record of trial contains abundant evidence of appellant's constructive and physical possession of the heroin and of her knowing facilitation of its concealment. It was appellant who made personal arrangements with John Lee on May 13th for the sale of heroin to take place in a few days. It was appellant who set a price of $500 an ounce for the 12 ounces [R. T. 75]. When she spoke to Lee again on May 18th, she modified the sale to involve only 2-1/2 ounces of heroin for $1200 [R. T. 79]. The sale was to take place sometime after 7:00 P. M., on May 19th [R. T. 80]

Agent Chesley, substituting for Lee because of illness, received a phone call from Nelson at 6:00 P. M., on May 20th, he gave Nelson directions to the motel. Nelson and appellant arrived by taxi and appellant was arrested with the heroin in her physical possession [R. T. 97].

The evidence is clearly substantial in demonstrating

appellant's active facilitation of the attempted sale and the concealment and actual possession of the heroin.

Even if the evidence showed only a possible inference of possession (which certainly is not the case here) " . . . the possible inference becomes a proper inference of the fact of possession . . . and once made by the trier of fact, and determined by him to be substantial, clear and convincing proof, such a determination of fact is binding on (this court). Williams v. United States, 290 F. 2d 451 (9th Cir. 1961)." Anthony v. United States, 331 F. 2d 687, 691 (9th Cir. 1964).

V

CONCLUSION

There appearing from the foregoing ample evidence to support the conviction, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, Jr.
United States Attorney

ROBERT L. BROSIO,
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES,
Assistant U. S. Attorney

Attorneys for Appellee
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eric A. Nobles

ERIC A. NOBLES